

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 442 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

JETHALAL Z VYAS

Versus

STATE OF GUJARAT

Appearance:

MR YS MANKAD for Petitioner
GOVERNMENT PLEADER for Respondent No. 1
M/S PURNANAND & CO for Respondent No. 2

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 23/04/98

CAV JUDGEMENT

This is plaintiff's second appeal.

2. The plaintiff appellant filed a suit for declaration that the order dated 31.5.76 by which he was reverted and reduced in the pay scale of Clerk is illegal, void and inoperative as well as unconstitutional with further declaration that he is entitled to pay and allowances in the revised pay scale w.e.f. 1.1.72. He

was appointed as a Clerk on 1.5.1958 in the Revenue Department by Collector, Kutch at Bhuj and was allocated to District Panchayat on 15.4.63. Thereafter he was promoted as Aval Karkoon and continued to work on this post till 31.5.76. When the plaintiff was promoted as Aval Karkoon there were four cadres i.e. Aval Karkoon, Extension Officer of Panchayat, Sr. Accounts Clerk and Senior Clerks. They were posts of the same grade and were transferable. Consequently after promotion as Aval Karkoon the plaintiff appellant was transferred and posted as Extension Officer, Panchayat. By the impugned order dated 31.5.76 the appellant was reverted to the post of Senior Clerk. By this order the plaintiff appellant suffered a loss of Rs.20/- p.m. According to him the revenue qualifying examination was not compulsory for promotion of a Clerk to the post of Aval Karkoon prior to 15.4.63 and even upto the date of the suit it was not a rule for allocated servants to pass any departmental examination. According to the plaintiff it was only Aval Karkoon who was allocated to Panchayat on 15.4.73 was to pass RQE examination and such examination was not compulsory for clerks to pass. One D.M.Nai who was junior to the appellant passed RQE examination and was placed in the seniority list above the appellant. The appellant challenged the seniority list also. The seniority of 2 other persons was also challenged by the appellant.

3. The defence in short was that since appellant did not pass the departmental examination he was rightly reverted and the order of reversion does not suffer any illegality. The seniority list was properly maintained and prepared. The appellant filed objection against the seniority list which was not acceptable. In this way it was pleaded that the impugned order is perfectly valid and legal.

4. The Trial Court found that the plaintiff/appellant had passed S.S.D. examination in 1964 and as such he should be promoted as Aval Karkoon and for Aval Karkoon passing of RQE examination was not necessary. It further found that the plaintiff/appellant passed the S.S.D examination within permissible limit of time and since it was not necessary for him to pass RQE examination he could not be reverted from the post of Aval Karkoon. The Trial Court further found that the impugned order was arbitrary and discriminatory and was also violative of article 14 & 16 of the Constitution. The Trial Court also observed that the appellant was entitled to pay and allowances attached to the posts of Aval Karkoon. It further observed that the seniority of

the plaintiff is effected. With these observations the suit was decreed and the impugned orders contained in Exh.45 and 46 were set aside.

5. The appeal was preferred which was allowed and the suit of the appellant was dismissed. It is therefore this second appeal. The following substantial question of law was formulated :-

"Whether the first Appellant Court erred in not declaring the orders, vide Exh.45 and Exh.46, which were passed against the appellant as illegal, unconstitutional, being against Art. 14 & 16 of the Constitution of India and being against the rules made by the State Government in that behalf."

6. The only point for adjudication in this appeal is whether the order impugned is illegal and ultra vires and contrary to articles 14 & 16 of the Constitution. The perusal of the judgement of the two courts below indicates that the plaintiff appellant adduced oral as well as documentary evidence whereas no evidence, oral or documentary was adduced by the defendant nos.1 & 2. It is therefore a case of uncontroverted evidence adduced by the plaintiff appellant which could hardly be disbelieved or rejected. Mere denial of the allegations in the plaint does not amount to proof of the defendant's case. In the absence of oral or documentary evidence, the defendants cannot be permitted to say that they have established their case. Of course the plaintiff would succeed on the strength of his case and cannot derive advantage of the weakness in defence but if the plaintiff's evidence remains uncontroverted from the side of the defendant there is no reason to view the plaintiff's evidence with suspicion or to reject it. The plaintiff's oral and documentary evidence has therefore to be accepted as uncontroverted and unchallenged.

8. The controversy in the appeal is very short. The plaintiff felt aggrieved of the impugned order and alleged that by the impugned order he is suffering a recurring loss of Rs.20/- p.m. in his emoluments. The question of reversion is therefore of only academic interest and it has to be considered in the light that it has caused financial loss to the appellant. The Trial court in its finding under issue no.2 has observed that the plaintiff has been given grade and scale of post of Aval Karkoon. It further observed that at present also he is Aval Karkoon. Thus so called reversion for a temporary period is to be considered as with a view to find out whether the impugned order has caused financial

loss to the plaintiff appellant and whether such order could be passed in the eyes of law under the existing rules.

9. The Lower Appellate Court has disagreed with the findings of the Trial court but it appears from the judgement of the Lower Appellate Court that contradictory findings were recorded by it. The Lower Appellate Court has observed that the appellant had passed sub-service departmental examination (S.S.D. examination) in 1964 and an entry to this effect was made in the service book of the appellant on 11.1.65. At one stage, the lower appellate court observed that the trial judge has rightly held that allocated employees were not required to pass departmental examination and has therefore rightly held that the plaintiff respondent could not be reversed on the ground of not passing the examination. Still with this agreement with the findings of the Trial court, the Lower Appellate Court preferred to dismiss the suit on self-contradictory grounds. The Lower Appellate Court further observed that in any case plaintiff proved to have passed SSD examination in accordance with rules and therefore he could not be disqualified from promotion on that ground. He agreed with the findings of the Trial court on this point also. The Trial court further found that the seniority list prepared in 1974 could not be challenged and on the ground of that seniority list reversion order could not be challenged by the plaintiff. The Lower Appellate court and the Trial court have differently interpreted a paper Mark 49/4. This document is not found on the record. Inquiry was made from the Lower Appellate Court but no satisfactory reply has come. Report was also taken from the Registry of this court but ultimately this paper could not be traced out. There is therefore no use in wasting further time and it has to be presumed that this document was lost and was not kept on record by the Lower court. According to the Trial court the paper marked 49/4 did not require Accounts clerk seeking promotion to the post of Aval Karkoon to pass RQE examination. According to the Lower Appellate Court, RQE examination was required to be passed even by such persons. It has thus to be seen which interpretation to this document is correct. In my opinion, the interpretation of this document given by the Trial court seems to be correct and the view taken by the lower Appellate court seems to be erroneous. The Trial court has found that the above paper shows that it was a letter written to the District Development Office, Revenue Department of Gujarat. It shows that those clerks who are promoted to the post of Aval Karkoon have to pass revenue qualifying examination for the purpose of

promotion to the post of Mamlatdar but they are not required to pass such examination for the purpose of promotion to the post of Aval Karkoon. The learned counsel for the appellant contended that this interpretation is the only interpretation of paper no.49/4 and since the appellant was not seeking promotion to the post of Mamlatdar he was not required to pass revenue qualifying examination.

10. The Lower Appellate court has differently interpreted this document. According to the Lower Appellate Court the document means that after promotion of Aval Karkoon some incumbents were promoted in Gujarat Development Service Class II and such persons were not be promoted as Mamlatdar in the Revenue Department and therefore they were not required to pass the RQE examination. The Lower Appellate Court further observed that this letter it is stated that in that circumstances persons other than allocated servants were not required to give permission to appear in RQE examination. This according to the Lower Appellate Court means persons other than allocated persons were only exempted from the examination and not the allocated servants. It is at this juncture that the Lower Appellate Court misinterpreted paper no.49/4. For all intents and purposes this letter means that if certain clerks who were promoted as Aval Karkoon were subsequently promoted in Gujarat Development Service Class-II such persons were not to be promoted as Mamlatdar in the Revenue Department and therefore they were not required to pass RQE Examination. The RQE examination was therefore to be passed by the incumbent claiming promotion to the post of Mamlatdar. The recital is the letter that persons other than allocated servants were not required to be given permission to appear in RQE examination means those persons designated as allocated servants who were seeking promotion to the post of Mamlatdar and only such persons were required to appear in RQE examination. The allocated servants who were not seeking promotion to the post of Mamlatdar and persons other than allocated servants were not required to pass RQE examination. Since the lower appellate court agreed with the findings of the Trial court that the appellant could not be reverted because he did not pass RQ examination, the subsequent finding of the lower appellate court that the appellant should have passed RQE examination is self-contradictory. The Appellate court concluded that the appellant passed SSD examination while posted as Sr.Clerk. It was then that he was promoted as Aval Karkoon. At no point of time he was seeking promotion to the post of Mamlatdar. Consequently he could not be

reverted from the post of Aval Karkoon to Sr.Accounts clerk only on the ground that he had not passed RQ examination. The impugned order dated 31.5.76 is therefore illegal and contrary to the directions contained in Paper No.49/4. As such the order of reversion has to be held as illegal and inoperative.

11. It seems that the defendants were not serious in taking the stand that the appellant should have passed RQ examination in order to enable him to claim promotion to the post of Aval Karkoon. Even after reversion the plaintiff was appointed as Aval Karkoon and given the scale of Aval Karkoon which is indicated in the finding of the trial court under issue no.2. There is no reason why for a short period during which the plaintiff appellant was illegally reverted should not be given the revised pay scale of Rs.425-800 w.e.f. 1.1.72.

12. In view of the aforesaid discussions, I am of the view that the lower Appellate court through contradictory findings erroneously dismissed the suit of the plaintiff appellant. Substantial question is answered in the affirmative. The appeal in these circumstances is bound to succeed.

13. Before parting with this judgement it is necessary to observe that the result of dismissal of this second appeal would result in revival of the decree of the Trial court. The decree of the Trial court is confusing. It simply says that it is held that orders in Exh.45 and 46 are illegal and hence they are set aside so far as the plaintiff is concerned. Beyond this, the decree remains silent. It has therefore to be clarified in this second appeal.

14. The appeal is therefore allowed. The judgement and decree of the lower Appellate court is set aside. The decree of the Trial Court is modified and it is declared that the impugned order dated 31.5.76 reverting the appellant in the lower scale of Sr.Clerk is illegal void and inoperative and that the appellant is entitled to draw the pay and allowances in the revised pay scale of 425-800 w.e.f. 1.1.72 less already received by him. In the circumstances of the case parties shall bear their own costs of this appeal.

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